

2007

State of Utah v. Patrick Henry Valdez : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
PATRICK HENRY VALDEZ,	:	Case No. 20070614-CA
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM CONSECUTIVE SENTENCES ON FIVE THIRD DEGREE FELONIES: THEFT BY RECEIVING STOLEN PROPERTY, ATTEMPTED BURGLARY, FORGERY, AND TWO COUNTS OF ATTEMPTED THEFT BY RECEIVING, IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, UTAH, THE HONORABLE DENO HIMONAS, PRESIDING

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No oral argument requested

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from consecutive sentences on five third degree felonies: Theft by receiving stolen property, attempted burglary, forgery, and two counts of attempted theft by receiving. This Court has jurisdiction under UTAH CODE § 78A-4-103(2)(e)(2008).

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

Did the trial court abuse its discretion in imposing five consecutive zero-to-five year terms where the record reflects that the trial court considered all the required statutory factors?

No standard of review applies. Defendant made no timely objection to the trial court's imposition of consecutive terms.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Any relevant constitutional provision, statute, or rule is cited in the body of this brief.

STATEMENT OF THE CASE

Charge. Defendant was charged in five different informations with two second degree felonies, four third degree felonies, and seven misdemeanors.

District court case no. 061907518. The first information was filed in June 2006 and included one felony and four misdemeanors: forgery, a third degree felony; purchase, transfer, possession or use of a dangerous weapon by a restricted person, a class A misdemeanor; attempted theft by deception, a class B misdemeanor; theft by receiving stolen property, a class B misdemeanor, and unlawful possession of drug paraphernalia, a class B misdemeanor. R518:1-3¹

District court case no. 061904724. The second information was filed in July 2006 and included one felony and one misdemeanor: theft by receiving stolen property, a third degree felony; and theft by deception, a class B misdemeanor. R724:2-3.

District court case no. 061905899. The third information was filed in September 2006 and included one felony and two misdemeanors: burglary, a second degree felony; theft, a class A misdemeanor; and criminal mischief, a class B misdemeanor. R899:2-3.

District court case no. 061906778. The fourth information was filed in October 2006 and included one felony: theft by receiving stolen property, a second degree felony. R778:1-2.

¹To differentiate the five pleadings volumes, the State will include the last three numbers of the district court case number in its citation, e.g., R[last three numbers of dist. court. case no.]:[internal record numbers]. Thus, citation to district court case no. 061907516 is indicated by the designation R516:[internal page numbers], and so on.

District court case no. 071901234. The fifth **information** was filed in November 2006 and included two felonies: theft by receiving stolen property, a second degree felony; and failure to respond to an officer's signal to stop, a third degree felony. R234:1-2.

Plea agreement. The three second degree felonies charged were all reduced to attempts and defendant thereafter pled guilty to five third degree felonies: forgery, in violation of UTAH CODE ANN. § 76-6-501 (West 2004); theft by receiving stolen property, in violation of UTAH CODE ANN. § 76-6-408 (West 2004 & Supp. 2007-2008); attempted burglary, in violation of UTAH CODE ANN. §§ 76-4-102(3), 76-6-202 (West 2004); and two counts of attempted theft by receiving stolen property, in violation of UTAH CODE ANN. §§ 76-4-102(3), 76-6-408 (West 2004 & Supp. 2007-2008). R518:1-4, 37, 45; R724:2-4, 32, 39; R899:2-4, 33, 42; R778:1-2, 34, 41; R234:1-3, 81, 90; *see also* R43:3-4 (the presentence report is contained in a manilla envelope). The remaining seven misdemeanor charges were dismissed. *Id.*

Sentence. At the consolidated sentencing hearing, the trial court emphasized defendant's "extensive criminal history, and the fact that these are all separate criminal episodes." R55:5. The trial court then imposed consecutive indeterminate prison terms of zero-to-five years for each of the five third degree felony convictions. *Id.*; *see also* R518:46-47; R724:44-45; R899:42-43; R778:41-42; R234:90-91.²

²A copy of the consolidated sentencing hearing transcript is attached in the addendum.

Timely notice of appeal. Defendant filed timely notices of appeal. *See* R518:48; R724:46; R899:44; R778:43; R234:92.

STATEMENT OF THE FACTS³

District court case no. 061907518. Defendant and a female cohort attempted to cash a stolen check at the Check City located at 2490 West 4700 South, in Taylorsville City. R518:3; R43:5. The check was in the amount of \$800 and was written on an account belonging to Joe Roage. R518:3. Roage reported being burglarized that same morning. *Id.* In addition to the stolen checks, the burglar took two Samsonite bags, a television, and CDs and DVDs. *Id.* Defendant and his female cohort were later apprehended and found in possession of Roage's property. R43:5. Defendant's cohort said that he had Roage's property when she picked him up, and she admitted attempting to cash one of Roage's checks. R518:4. A search of defendant's person yielded a knife and two syringes. *Id.* Defendant admitted carrying a concealed knife and to using narcotics. *Id.*

District court case no. 061904724. A burglar forced open the front door of Mario Ramos's home and took several items, including a Jupiter Alto Saxophone valued at approximately \$1200. R724:4. Defendant was caught on videotape pawning the saxophone for \$40 at a Cash America located at 4235 West 3500 South. *Id.* The Cash America

³Because defendant pled guilty, the relevant facts are drawn from the Informations, defendant's statements in support of his guilty pleas, the transcript of the consolidated sentencing hearing, and the presentence report.

employee verified defendant's identity at the time of the transaction and recorded his fingerprint. R43:6.

District court case no. 061905899. Salt Lake City police officers responded to a burglary in progress at 3390 South 685 East. R43:6. The officers saw defendant carrying a television from the home. *Id.* When defendant realized he had been seen, he dropped the television and fled on foot, successfully eluding the officers. *Id.*; R899:3-4. The door of the home had been kicked in and the interior ransacked. *Id.* Defendant's accomplice, his nephew, was apprehended at the scene. *Id.* at 7. Defendant and his nephew had been in the process of loading the stolen property into a stolen vehicle when the police officers arrived. *Id.*; see also R899:3-4

District court case no. 061906778. Rachel McCall's car was stolen from where it was parked outside her Taylorsville City residence. R43:7. A West Valley City police officer saw defendant park in an alley and begin removing things from the car he had been driving and throwing them in a nearby dumpster. *Id.* A records check revealed that the car belonged to McCall. *Id.* The officer checked the car and noted that the engine was running, but that there was no key in the ignition. R778:2-3. A search of defendant's person revealed "a movie ticket with McCall's name on it and a faked car key." *Id.* at 3.

District court case no. 071901234. Defendant initially eluded police driving a stolen vehicle in a high-speed chase. R234:2-3; R43:5. The stolen vehicle was found shortly thereafter, parked near the service entrance of a Sam's Club store located at 7571 South 3800 West in Salt Lake County. R234:2. Defendant was spotted in a rear corner of the store

“wearing a coat liner” inside out. *Id.* Realizing he had been seen, defendant headed to the front of the store. *Id.* Defendant was stopped and asked for his Sam’s Club card, which he did not have. *Id.* Defendant first claimed to have entered the store with his mother, but then said that he had just come through the front doors. *Id.* at 3. A store employee said defendant had “approached the front of the store several times to look outside,” and acted “extremely nervous.” *Id.* Defendant appeared to have just shaven and still had red marks on his face, “missed patches of hair, and hair clippings on his clothes.” *Id.* A pair of black gloves and a black razor were found in a garbage can in the store restroom. *Id.* One of the sinks was also “covered with freshly shaven hair.” *Id.* A sweatshirt was found hidden by some pallets in the rear of the store where the defendant was first seen. *Id.*

Defendant denied having a car and said he was planning to ride the bus. *Id.* But defendant had a key to the stolen vehicle in his pocket. *Id.* Defendant did not have the vehicle owner’s permission to drive or use her car. *Id.*

Consolidated sentencing hearing. At the consolidated sentencing hearing, the trial court confirmed that defense counsel had “seen the pre-sentence report” before proceeding. R55:2. Defense counsel thereafter referenced information in the report, emphasizing that he did not want to “minimize” defendant’s “horrible” criminal record, and acknowledging that defendant had “been essentially in and out of prison, and mostly in prison for the last—coming up on 40 years.” *Id.* Defense counsel instead wanted to focus on defendant’s attitude, which he characterized as being amenable to treatment: “He’s never asked to be out

of jail. He told me from the very first time I met him, ‘I am a drug addict. I need to be in jail. I want help. Please get me help.’” *Id.* at 3; *see also id.* at 5. Defense counsel emphasized that defendant had “taken a level of responsibility,” and had “never complained.” *Id.* at 3. According to counsel, in defendant’s long criminal history, this was the first time that defendant had admitted to being an addict and that “this [was] something that he [could] not handle on his own.” *Id.* at 4. Defense counsel argued that defendant had reached the age in life where he realized “that he doesn’t have a whole lot of time left, and . . . he doesn’t really want to spend” that time “in prison.” *Id.* Defendant was also interested in re-engaging in his son’s life. *Id.* Defense counsel asked the trial court to grant probation and put defendant in a treatment program, but he also recognized that there was a “strong presumption that [defendant] will go to prison on these cases; and that [defendant had] come to terms with that throughout this whole case.” *Id.* at 5. If the trial court imposed prison terms, defense counsel asked that it follow the recommendation for concurrent terms in the presentence report. *Id.* Given the opportunity to address the court himself, defendant emphasized that he wanted to “get some treatment.” *Id.*

The prosecutor agreed with the recommendation for concurrent prison terms. *Id.* at 5-6. The prosecutor emphasized that the parole board could ultimately decide “how well [defendant was] doing in terms of his drug habit and that sort of thing in prison.” *Id.* at 6.

The trial court also heard from one of defendant’s victims. *Id.* at 7. The victim explained that he felt violated by defendant’s criminal conduct, that he worked two jobs to earn a living, and that, in his opinion, defendant should not be granted probation. *Id.*

Just before the trial court pronounced sentence, defense counsel asked the court to grant defendant credit for time served, assuming that the trial court was inclined to follow the recommendation for concurrent prison terms. *Id.* at 8. The trial court, however, rejected the recommendation for concurrent terms and imposed consecutive terms, but did grant credit for time served. *Id.* at 8-9. In so doing, the trial court expressly noted defendant's "extensive criminal history, and the fact that these are all separate criminal episodes." *Id.* Defendant raised no objection. *Id.*

SUMMARY OF THE ARGUMENT

Although defendant asked for probation in this case, he acknowledged the strong possibility of receiving prison terms instead. If the trial court was inclined to deny probation, defendant asked the court to follow the recommendation for concurrent prison terms, but made no argument against consecutive prison terms. Moreover, he did not object to the imposition of consecutive prison terms, and never asserted that the trial court had failed to consider his character and rehabilitative needs, as he now asserts on appeal. Nor does defendant assert that this Court should review his claim of sentencing error under the doctrines of plain error or exceptional circumstances. Thus, defendant's unpreserved challenge to his consecutive sentences may not be reviewed on appeal.

But even assuming that defendant preserved his challenge to the trial court's imposition of consecutive terms, he fails to show any abuse of the trial court's broad sentencing discretion. Contrary to defendant's assertion on appeal, the record reflects that

the trial court considered his character and rehabilitative needs before imposing the consecutive terms.

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING CONSECUTIVE TERMS WHERE THE RECORD REFLECTS THAT THE TRIAL COURT CONSIDERED ALL REQUIRED STATUTORY FACTORS

Defendant challenges the trial court's imposition of consecutive zero-to-five-year terms, alleging that the trial court did not adequately consider his "character and rehabilitative needs." Aplt. Br. at 11. Defendant further asserts that the imposition of consecutive terms "removed from the Board of Pardons and Parole the opportunity to monitor [defendant's] rehabilitation and decide his rehabilitative needs if he continued to show improvement through an appropriate treatment program." *Id.* at 15. Defendant's claims should be rejected for at least two reasons.

First, defendant raised no objection below. His challenge is thus unpreserved and he does not assert plain error or exceptional circumstances. Second, even assuming that defendant had objected to the consecutive sentences below, he fails to show any abuse of the trial court's broad sentencing discretion. The record reflects that the trial court considered his character and rehabilitative needs. Moreover, the consecutive third degree terms had a floor of zero years. Accordingly, the consecutive terms do not deprive the Board of its discretion to consider defendant's future progress toward rehabilitation.

A. Defendant preserved no challenge to the trial court's imposition of consecutive terms, and raises no claim of plain error or exceptional circumstances.

Utah courts will not consider claims raised “for the first time on appeal unless the trial court committed plain error or exceptional circumstances exist.” *State v. Winfield*, 2006 UT 4, ¶ 23, 128 P.3d 1171 (case citation and quotation marks omitted). *See also State v. Cruz*, 2005 UT 45, ¶ 33, 122 P.3d 543; *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346; *State v. Tillman*, 750 P.2d 546, 551 (Utah 1987). Utah’s courts require timely and specific objections “in order ‘to bring all claimed errors to the trial court’s attention to give the court an opportunity to correct the errors if appropriate.’” *State v. Brown*, 856 P.2d 358, 361 (Utah App. 1993) (citation omitted). *See also Holgate*, 2000 UT 74, ¶ 11 (“‘[T]he trial court ought to be given an opportunity to address a claimed error and, if appropriate, correct it’”) (quoting *State v. Eldredge*, 773 P.2d 29, 36 (Utah 1989), *cert. denied*, 493 U.S. 814 (1989)). “Accordingly, an objection ‘must at least be raised to a level of consciousness such that the trial [court] can consider it.’” *Cruz*, 2005 UT 45, ¶ 33 (quoting *Brown*, 856 P.2d at 361).

Here, pursuant to a plea agreement, defendant pled guilty to five third degree felonies—three of which were reduced from second degree felonies—in exchange for dismissing the seven remaining misdemeanors. *See, e.g.*, R43:3-4. The plea agreement did not address what recommendation, if any, the prosecutor might give. *Id.* The presentence report recommended concurrent prison terms. *Id.* at 2. At the sentencing hearing, defense counsel asked for probation, but recognized the likelihood of prison terms and alternatively asked the trial court to follow the recommendation in the presentence report. R55:5. He

made no argument against consecutive terms. *Id.*; *see also id.* at 2-4, 6-8. When the trial court rejected the recommendation for concurrent terms and instead imposed consecutive terms, emphasizing defendant’s “extensive criminal record,” and “the fact that these [were] all separate criminal episodes,” defendant raised no objection, and never suggested that the trial court had failed to consider all legally relevant factors. R55:8.

Notwithstanding the above, defendant asserts that his challenge to the consecutive terms was preserved when defense counsel asked the trial court to follow the recommendation in the presentence report for concurrent terms. *See* Aplt. Br. at 2 (citing R55:5, 43). But defense counsel’s request was wholly insufficient to alert the trial court to the error now claimed on appeal—that it failed to consider defendant’s “character and rehabilitative needs” before it imposed consecutive terms. Aplt. Br. at 11; *see also id.* at 16. In other words, defense counsel’s request that the trial court follow the sentencing recommendation did not raise the now alleged sentencing error “to a level of consciousness such that the trial [court] [could] consider it.” *Cruz*, 2005 UT 45, ¶ 33 (quoting *Brown*, 856 P.2d at 361); *State v. Weaver*, 2005 UT 49, ¶ 17, 122 P.3d 566 (holding Weaver failed to “distinctly or specifically” articulate claimed error with regard to trial court’s ruling on the inadmissibility of a police report and thus waived the claim on appeal).

This Court’s opinion in *State v. Williams*, 2006 UT App 420, 147 P.3d 497, supports that the consecutive sentencing issue in this case is unpreserved. Although Williams’s challenge to his consecutive terms was sufficiently raised in the trial court, this Court deemed the preservation issue in *Williams* to be a close question. *Id.* at ¶ 28 n. 6 (“We deem the issue

sufficiently preserved, albeit marginally so”). It was a close question because Williams’s defense counsel did not specifically object to the consecutive terms in that case, but did “assert[] that he had questions about the consecutive nature of Williams’s sentences.” *Id.* Moreover, Williams himself complained that the sentence “was ‘kind of harsh.’” *Id.* Although these broad statements were deemed sufficient to preserve the consecutive sentencing issue in *Williams*, no similar statements or objections to the imposition of consecutive terms are found in this record. *See* R116:1-5. Thus, unlike Williams, defendant did not preserve any challenge to the trial court’s imposition of consecutive terms.

In sum, because defendant did not object to the legality of the trial court’s consecutive sentences below, *see* R55:8, and because he does not assert plain error or exceptional circumstances on appeal, *see* Aplt. Br. at 6-15, appellate review of the claimed sentencing error is foreclosed. *Winfield*, 2006 UT 4, ¶ 23 n.6 (declining to infer a plain error argument); *State v. Pledger*, 896 P.2d 1226, 1229 n.5 (Utah 1995) (declining to review unpreserved issue because Pledger did not argue that review was justified by “‘exceptional circumstances’ or ‘plain error’” (case citation omitted)).

B. Defendant fails to show any abuse of the trial court’s broad sentencing discretion.

Even assuming that the Court deems the consecutive sentencing issue preserved here, defendant has shown no abuse of the trial court’s broad sentencing discretion.

1. *Utah trial courts have broad sentencing discretion.*

UTAH CODE ANN. § 76-3-401(2) (West 2004), requires that when choosing between consecutive and concurrent sentences, “the court shall consider the gravity and circumstances of the offenses, the number of victims, and the history, character, and rehabilitative needs of the defendant.” A trial court may thus commit error or abuse of its discretion, if it imposes consecutive terms without considering all the factors that are legally relevant to the sentencing determination. *See, e.g., State v. McCovey*, 803 P.2d 1234, 1235 (Utah 1990); *State v. Montoya*, 929 P.2d 356, 358 (Utah App. 1996). A trial court, however, need not explicitly note “the extent to which it considered each of the factors” relating to the specific factors listed above. *State v. Helms*, 2002 UT 12, ¶¶ 10-11, 40 P.3d 626.

In addition, “as a general rule [the reviewing court] upholds . . . the findings on the record whenever it would be reasonable to assume the [trial] court actually made such findings.” *Id.* at ¶ 11 (internal quotations and citations omitted). *See State v. Valdovinos*, 2003 UT App 432, ¶ 28, 82 P.3d 1167 (“the burden is on the defendant to show that the trial court did not properly consider all the factors in section 76-3-401(4)”). The presumptive protection afforded to a trial court’s sentence can be rebutted only if “(1) an ambiguity of facts make the assumption unreasonable, (2) a statute explicitly provides that written findings must be made, or (3), a prior case states that findings on an issue must be made.” *Helms*, 2002 UT 12, ¶ 11 (internal citations omitted). None of these circumstances exists here.

Moreover, the trial court's discretion in weighing the statutory factors reflects the general principle that courts are accorded broad discretion in sentencing matters. It is the trial court, after all, that is in the most advantaged position to make the highly individualistic assessments required in sentencing decisions. *State v. Woodland*, 945 P.2d 665, 671 (Utah 1997). In deciding the appropriateness of a particular sentence, a trial court must consider many intangibles, like the defendant's "character, personality, and attitude, of which the cold record gives little inkling." *State v. Sibert*, 310 P.2d 388, 393 (Utah 1957).

2. *The record supports that the trial court considered defendant's character and rehabilitative needs in imposing consecutive terms; therefore, no abuse of discretion exists.*

Here, contrary to defendant's claim, "the record . . . actually contains evidence to suggest that the trial court did consider all of the factors," including defendant's character and rehabilitative needs. *Helms*, 2002 UT 12, ¶ 13. Defendant therefore fails to demonstrate any abuse of the trial court's broad sentencing discretion.

On appeal, defendant asserts that the trial court failed to consider "all of the statutory factors mandated under Utah law" when it imposed the consecutive sentences below. Aplt. Br. at 6, 16. *See also* Section 76-3-401(2). Defendant identifies and analyzes only two of the required factors in his brief—character and rehabilitative needs. *See, e.g.*, Aplt. Br. at 11 ("[T]he trial court abused its discretion by imposing consecutive sentences without adequately considering [defendant's] character and rehabilitative needs"), 15 ("[T]he trial court in this case failed to consider [defendant's] character or rehabilitative needs"). The State's analysis thus focuses on these two factors.

Notably, defendant acknowledges that “[t]he presentence report . . . considered all of the statutory factors,” and he does not claim that the trial court failed to review the presentence report before the consolidated sentencing hearing. Aplt. Br. at 6. Nor could he, because the record supports that the trial court reviewed the presentence report. Indeed, the trial court made sure that defense counsel had reviewed the report before the court would even proceed with the sentencing hearing. *See* R55:2. Defense counsel affirmed that he had reviewed the report, and then relied on information in the report in his argument to the trial court. *See, e.g., id.; see also id.* at 5. But rather than focus on defendant’s “horrible” criminal history as detailed in the report, defense counsel argued that the trial court should consider an alleged recent change in defendant’s attitude and amenability to treatment: “[T]hat’s what we want the [c]ourt to know, and that’s what we want the [c]ourt to focus on, at least a little bit, rather than just focus on his past.” *Id.* at 4-5; *see also id.* at 3.

Although defense counsel argued that defendant’s allegedly changed attitude rendered him amenable to treatment, the information in the presentence report undercut that assertion. For example, defendant told the presentence investigator that, although he had been accepted into both the Odyssey House and Salvation Army programs, “he would rather complete the Salvation Army program because he ha[d] heard how tough the Odyssey House program can be stating, ‘I don’t want to set myself up to fail.’” R43:3. A handwritten note in the margin, presumably made by the trial court, consequently questioned defendant’s amenability to treatment: “Odyssey House too tough?” *Id.*

Defendant's statement in the presentence report indicated his "remorse for each and every time I find myself in jail or on my way back to prison." R43:7. That remorse, however, is more directed at his suffering the consequences of his conduct than it is to his innumerable victims: "I can see that there are many victim's to my crime's [sic] and to the life styel [sic] of my pass [sic]. I see one more when I look at myself!" R43:8.

Given the above, and defendant's extensive criminal history, dating back to 1966, *see* R43:10-15, the presentence investigator reasonably questioned the credibility of defendant's assertion that he had a changed attitude: "[A]lthough the defendant states he wants the opportunity for treatment (and has been 'accepted'), what makes 'this time' so different?" R43:3. Thus, although the investigator "[i]nitially" "had empathy for the defendant and thought he should be given one chance at probation with treatment," the investigator ultimately concluded defendant needed to be in prison: "[I]t would be one thing if his crimes had no victims, but every one of his current offenses has a victim (s). The defendant repeatedly committed offenses against society and specifically, random innocent individuals to support his drug habit." *Id.*

In light of the above, it is not surprising that the trial court emphasized defendant's "extensive criminal history, and the fact that these are all separate criminal episodes" when deciding to impose consecutive rather than concurrent terms. R55:8. The trial court's emphasis on these factors, however, does not suggest that it failed to consider defendant's character and rehabilitative needs, as defendant now claims. *See* Aplt. Br. at 11, 16. Indeed, as noted, it is undisputed that defendant's character and rehabilitative needs were fully set

out in the presentence report—and that the trial court reviewed the report. *See, e.g.*, Aplt. Br. at 6. Moreover, defendant’s asserted change of attitude and amenability to treatment were the entire focus of defense counsel’s oral argument at the consolidated sentencing hearing. *See* R55. The record thus supports that the trial court considered defendant’s character and rehabilitative needs, it merely gave them little weight. *See* section 76-3-401(2).

The real crux of defendant’s complaint on appeal appears to be that the trial court disagreed with his assessment of his character and prospects for rehabilitation. “However, the fact that [defendant] views his situation differently than did the trial court does not prove that the trial court neglected to consider” either criteria. *Helm*, 2002 UT 12, ¶ 14. Defendant also wants more explanation for the trial court’s deviation from the recommendation for concurrent terms. Aplt. Br. at 13. But the trial court’s comments at the sentencing hearing, emphasizing defendant’s “extensive criminal history,” and “separate criminal episodes,” are a sufficient basis for departing from that recommendation. Indeed, a trial court need not explicitly note “the extent to which it considered each of the factors” in section 76-3-401(2). *Helms*, 2002 UT 12, ¶ 10. Moreover, nothing in section 76-3-401(2) requires trial courts to accord each of the statutory factors equal weight, let alone give more weight to a defendant’s newly alleged change of heart over his dismal criminal history and number of victims. *See State v. Gibbons*, 779 P.2d 1133, 1137 (Utah 1989) (no abuse of discretion where trial court gave more weight to circumstances of offense than to Gibbon’s desire to change and post-arrest good behavior). *See also State v. Howell*, 707 P.2d 115, 117-119 (Utah 1985) (recognizing that sentencing judges generally give considerable weight to circumstances of

crime); *State v. Russell*, 791 P.2d 188, 192 (Utah 1990) (“One factor in mitigation or aggravation may weigh more than several factors on the opposite scale”); *State v. Kelly*, 784 P.2d 144, 145 (Utah 1989) (not abuse of discretion to give little weight to defendant’s lack of similar criminal history, cooperation with law enforcement, or candidacy for a recognized treatment program).

3. *State v. Smith and State v. Galli are not controlling.*

Because this case involves the imposition of consecutive third degree felony terms, rather than consecutive first degree felony terms, it is distinguishable from both *State v. Smith*, 909 P.2d 236 (Utah 1995), and *State v. Galli*, 967 P.2d 930 (Utah 1998). Defendant cites these cases to support his assertion that the trial court failed to adequately consider his rehabilitative needs. Aplt. Br. at 8-9, 15. *Smith* and *Galli* stand for the proposition that a trial court abuses its sentencing discretion when consecutive sentences deprive the Board of Pardons and Parole of its discretion to consider a defendant’s progress toward rehabilitation. *See Smith*, 909 P.2d at 245, and *Galli*, 967 P.2d at 938. Thus, although the *Smith* and *Galli* trial courts considered the requisite criteria, the Utah Supreme Court ultimately overturned the consecutive sentences in both cases.

For example, in *Smith*, the supreme court held that consecutive, fifteen-year minimum-mandatory sentences on four first degree felony offenses—sixty years—amounted to a defacto life term that effectively deprived the Board of “discretion” to take into account Smith’s “future conduct and possible progress toward rehabilitation.” 909 P.2d at 244-45.

Although the imposition of consecutive sentences on three indeterminate first degree felony terms in *Galli* did not involve minimum-mandatory terms, and did not result in an effective life term, a majority of the supreme court held that the consecutive sentences were sufficient to deprive the Board of its discretion. *Galli*, 967 P.2d 938. This is because running the first degree felony terms consecutively in *Galli* meant that Galli was ostensibly facing a minimum of fifteen years to life. *Id.*

In this case, on the other hand, the five third degree felony terms had a floor of zero to five years. UTAH CODE ANN. § 76-3-203(3) (West 2004). Thus, even running them consecutively the floor remains at zero years. Given this circumstance, defendant's consecutive sentences for five indeterminate third degree felonies are not comparable to the consecutive first degree felony terms imposed in *Smith* and *Galli*. They certainly in no way impinge on the Board's discretion. Indeed, the Board will exercise its discretion to decide just how many years, "not to exceed five years," that defendant actually serves on each of the five terms. § 76-3-203(3). In other words, if defendant shows improvement he may be released from prison at any time—there is no minimum number of years he must serve. If, on the other hand, defendant does not progress toward rehabilitation, the Board retains discretion to keep him incarcerated for up to twenty-five years.


In sum, the record reflects that the trial court considered defendant's character and rehabilitative needs. And the consecutive sentences do not infringe the Board's discretion to determine the actual length of defendant's incarceration. Defendant therefore fails to show any abuse of the trial court's broad sentencing discretion.

CONCLUSION

The trial court's imposition of five consecutive zero-to-five year terms should be affirmed.

RESPECTFULLY submitted on 13 March 2008.

MARK L. SHURTLEFF
Utah Attorney General

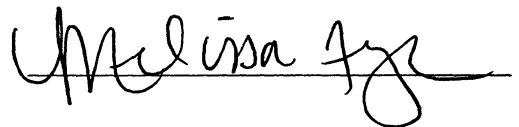

MARIAN DECKER
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MAILING CERTIFICATE

I certify that on 13 March 2008, I mailed a copy of the foregoing BRIEF OF APPELLEE, postage prepaid, to the following:

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Addendum

00-006000

-1-

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

PATRICK HENRY VALDEZ,

Defendant.

ORIGINAL

Case No. 061904724 FS
061905899
061906778
061907518
071901234

Sentencing Hearing
Electronically Recorded on
June 22, 2007

FILED DISTRICT COURT
Third Judicial District

JUL 30 2007

BEFORE: THE HONORABLE DENO HIMONAS
Third District Court Judge

By Bn SALT LAKE COUNTY

Deputy Clerk

APPEARANCES

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FILED
UTAH APPELLATE COURTS

AUG 31 2007

20070614-GA

P R O C E E D I N G S

(Electronically recorded on June 22, 2007)

THE COURT: Okay. All right, this is the time and date set for sentencing in the matters of Patrick Valdez and Donald Valdez. I understand the same individual; is that right?

MR. CORUM: Yes, Judge.

THE COURT: You've seen the pre-sentence report?

MR. CORUM: We have.

THE COURT: All right. Please be proceed.

MR. CORUM: Judge, my understanding the Court has received a letter from Mr. Valdez that was forwarded to my office and to the State on his (inaudible). Have you reviewed that, by any chance?

THE COURT: It's not in the file. Do you have it?

MR. CORUM: I do. May I approach? I think this -- a lot of these things are things he said to -- in his discussions with AP&P and in his statement to AP&P.

I am not going to stand up here and in any way minimize or attempt to minimize what he's done or his record. I mean, quite -- it's horrible. I mean, you know, Ms. Burton and I were just talking about it. I mean, his first stint in prison, you know, almost predates us as people. He's been essentially in and out of prison, and mostly in prison for the last -- coming up on 40 years. You know, he gets out, he stays out for a little while, he re-offends, and then he's --

1 THE COURT: I remember the letter. I don't know why
2 I don't have a copy. It's probably one in the files, I'm
3 imagining. It's not -- there it is. That's right.

4 MR. CORUM: He was sent to prison on his -- while he
5 was 18 on his first adult offense; and he's going back ever
6 since. Quite frankly, I think if people would have looked at
7 it a little bit more closely, could have absolutely predicted
8 this history and this pattern; and it's come to fruition.

9 What I do want to focus on, Judge, is that Mr. Valdez,
10 his attitude throughout this case, since I first met him, he
11 has never -- not even mentioned the possibility of getting out
12 of jail. He's never asked to be out of jail. He told me from
13 the very first time I met him, "I am a drug addict. I need to
14 be in jail. I want help. Please get me help."

15 He never talked about trying to beat the cases. We
16 would talk about -- you know, some of the -- quite frankly, a
17 couple of these, you know, I had some issues. I would talk to
18 him about them, and he didn't want to hear any of it. He just
19 wanted to -- the only thing that prevented him from pleading
20 his charges on these cases was that it took some time to get
21 them all together.

22 He has taken a level of responsibility that quite
23 frankly I have not seen before, and a level of self awareness
24 about what his problem is and what needs to happen that I
25 think is very, very rare. He's never complained. He's never

1 (inaudible) delays of this.

2 He's just taken it all in stride and said to me
3 consistently, "That's fine. I need to be in jail right now.
4 I need to be clean. Please get me some help. I've never had
5 help. I've never had a program. I get out, you know, into the
6 world. I get -- things get stressful, and I fall right back
7 into drugs every single time."

8 It has, and he's noticed it, and his family's noticed
9 it. His long-time friend, Barbara, is here, the mother of his
10 son. She was relaying to me that this is the first time really
11 this last period that she's ever seen him admit, number one,
12 that he's a drug addict; but number two, that this is something
13 that he cannot handle on his own.

14 I don't know what the impetus of it was; whether it
15 was just he was -- he's gotten to that age where, you know,
16 he's facing his own mortality, and realizing that he doesn't
17 have a whole lot of time left, and in that time he doesn't
18 really want to spend in prison.

19 I do know that he connected with his son not too
20 long ago. His son got back from Iraq and visited him at the
21 jail when this first kind of started happening; and they were
22 reconnected, and his son wants him in his life very, very much,
23 and he wants to be in his son's life.

24 So that's what we want the Court to know, and that's
25 what we want the Court to focus on, at least a little bit,

1 rather than just focus on his past. That he does have a
2 chance. He does have the attitude, I think, to at least give
3 treatment a try for once.

4 THE COURT: Right.

5 MR. CORUM: That's what we're asking for. We have
6 gone to both Odyssey House and Salvation Army. Myself and the
7 treatment people feel fairly strongly that Salvation Army is a
8 better option for him, that he will fair better there; but
9 quite frankly, he -- we'll take whatever he can get.

10 Mr. Valdez does understand the strong presumption that
11 he will go to prison on these cases; and he's come to terms
12 with that throughout this whole case. If that were to happen,
13 he would ask the Court to follow the recommendation that these
14 be concurrent.

15 THE COURT: All right, thank you.

16 Mr. Valdez, this is your opportunity to speak to me
17 about your potential sentencing. Is there anything that you
18 would like to say at this time?

19 MR. VALDEZ: I don't think I could add any more than
20 what he's said; but I'd just like to confirm that this is how I
21 feel about dealing with it. I'd like to get some treatment.

22 THE COURT: All right. What's the State's position?

23 MR. PLATT: Chad Platt for the State, Judge. The State
24 agrees with the recommendation. Specifically that there's a
25 paragraph that I think is the most noteworthy by the pre-

1 sentence preparer on page 3. That is, initially that the
2 investigator states that he had empathy, because he's very
3 honest and straightforward with the things that he's done
4 in the past.

5 Then concludes, "However he does need to go to prison,
6 based upon the fact that these crimes now are affecting
7 innocent people." The majority of these crimes involve theft
8 to support the drug habit; and there's no way that the State
9 can recommend anything else, but to protect our community.

10 The concurrent sentence because of his attitude at
11 this point, that's appropriate. However, I think he's going
12 to be seeing the parole board and let them decide how well
13 he's doing in terms of his drug habit and that sort of thing
14 in prison. I'd submit on that.

15 THE COURT: All right. Is there anybody here that
16 wants to speak to this matter?

17 (No response)

18 THE COURT: All right, Mr. Corum, is there any legal
19 reason of which you are aware not to proceed to sentence?

20 MR. CORUM: No, Judge.

21 THE COURT: Sir, do you want to speak?

22 VICTIM: Your Honor, I was the person that he's -- he
23 is the person that broke into my house.

24 THE COURT: Come on up here, and tell me who you are,
25 sir. Come right on up and introduce yourself for me.

1 VICTIM: I apologize coming in dressed inappropriately,
2 your Honor.

3 THE COURT: You look absolutely fine.

4 VICTIM: I'm sorry about that. I was the person that
5 broke in -- this person broke in my house. I really feel like
6 I've been violated.

7 THE COURT: I understand.

8 VICTIM: I'm sorry, violated. I work two jobs.
9 I work so hard to have my things, and with this guy with no
10 consideration of -- absolutely of nothing. You know, he broke
11 into my house. I had problems. My insurance, they pay for it,
12 but that is something that I would rather prefer to have my own
13 things in the beginning before he opened.

14 This the first time it happened? I think it's not the
15 first time it happened. I come here, and there's several times
16 you do this. Why do you do that? This has caused me a lot of
17 pain, your Honor.

18 THE COURT: Yes.

19 VICTIM: I really (inaudible) that his sentence that he
20 shouldn't be put on parole. Put him in jail, and this is where
21 he belongs -- where he belongs to.

22 THE COURT: All right.

23 VICTIM: Thank you, your Honor.

24 THE COURT: Thank you, sir. Is there anybody else who
25 wants to speak in this matter?

1 (No response)

2 THE COURT: Mr. Corum, is there any legal reason of
3 which you are aware why I should not proceed to sentence?

4 MR. CORUM: No, Judge. We would ask the Court, if
5 the Court's going to follow the recommendation, to make a
6 recommendation that he receive credit for time served.

7 THE COURT: All right. With respect to case ending
8 1234, and the charge of attempted theft by receipt of stolen
9 property, a third-degree felony, I'm sentencing you to zero to
10 five at the Utah State Prison.

11 With respect to the matter ending 7518, the charge of
12 forgery, a third-degree felony, I'm sentencing you to zero to
13 five at the Utah State Prison.

14 With respect to the matter ending 724, theft by
15 receipt of stolen property, a third-degree felony, I'm
16 sentencing you to zero to five at the Utah State Prison.

17 With respect to the matter ending 899, attempted
18 burglary, a third-degree felony, I'm sentencing you to zero
19 to five at the State Prison.

20 With respect to the matter ending 778, the charge of
21 attempted theft by receipt of stolen property, a third-degree
22 felony, I'm sentencing you to zero to five at the State Prison.

23 These will run consecutively, given your extensive
24 criminal history, and the fact that these are all separate
25 criminal episodes. You are to serve zero to twenty-five years

1 at the Utah State Prison as a result. You have 30 days in
2 which to appeal your sentence.

3 COURT CLERK: And did you say credit for time served?

4 THE COURT: Credit for time served.

5 (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

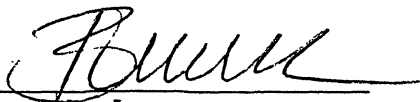
That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 25th day of July 2007.

My commission expires:
February 24, 2008


Beverly Lowe
NOTARY PUBLIC
Residing in Utah County

